No. 06-415

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In The
Supreme Court of the United States

JOHN SELIG in his official capacity as Director of the ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES; RAY HANLEY in his individual capacity as former Director of the DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES; and ROY JEFFUS, in his individual capacity and his official capacity as Director of the DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioners,

vs.

PEDIATRIC SPECIALTY CARE, INC.; CHILD AND YOUTH PEDIATRIC DAY CLINICS, INC.; FAMILY COUNSELING AND DIAGNOSTIC CLINIC; TOMORROW'S CHILD LEARNING CENTER LLC; D AND D FAMILY ENTERPRISES, INC.; JAMES SWINDLE and STACEY SWINDLE as parents and next best friends of JACOB and NOAH SWINDLE, minors; SUSANN CRESPINO, as parent and next best friend of MICHAEL CRESPINO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Ray Hanley and Roy Jeffus are Entitled to Qualified Immunity.

In their Brief in Opposition the respondents say nothing about the serious impact that the Eighth Circuit decision will have on Medicaid programs. Similarly, the respondents offered no response to the points made in the amicus brief filed by numerous states. Indeed, they ignored the brief altogether.

The impact of the Eighth Circuit decision on states will be three-fold. First, states attempting to hire Medicaid administrators will doubtless find that desirable individuals will not apply because they do not want to assume the risk of personal liability that the Eighth Circuit decision imposes. Second, even though Medicaid programs must have effective methods and procedures to prevent unnecessary care, and even though federal law provides for administrative review of each adverse medical necessity decision, Medicaid providers can tie up Medicaid administrators in federal court litigating their states' utilization control processes. Third, and most important to the needy individuals that Medicaid serves, by threatening Medicaid administrators with personal liability for implementing federally authorized utilization control procedures the Eighth Circuit decision substantially decreases the likelihood that Medicaid programs will effectively eliminate payments for unnecessary care. As Medicaid budgets are squeezed, coverage reductions affecting the truly needy are often the result.

The respondents have not come close to making a case that the only conduct attributed to Ray Hanley – establishing prior authorization medical necessity reviews in the Child Health Management Services ("CHMS") program – violated any clearly established right. In fact, the respondents barely mention the "clearly established right" test, much less satisfy it.

Though the respondents argue that the Supreme Court should not consider qualified immunity because the issue is fact-specific, that is not the case. The petitioners do not ask this Court to review any factual issue. Rather, petitioners raise a legal question of great importance to states. The Eighth Circuit held that state officials are not entitled to qualified immunity based on their creation of a prior authorization program, and that holding raises serious concerns. The factual issues the respondents cite are largely beside the point. In any event, their factual arguments are misguided and do not suggest that Ray Hanley and Roy Jeffus violated any clearly established right.

In this case the alleged right is publicly funded medical care that a board-certified physician has determined is medically unnecessary, or, alternatively, favorable medical necessity determinations. It cannot be argued that such rights are clearly established because they do not exist at all.

The fact question in this case – whether AFMC's board-certified physician reviewers' medical necessity denials were correct – is not raised or argued in the Petition for Writ of Certiorari. Regardless of the ultimate resolution of that question, neither Ray Hanley nor Roy Jeffus should be subjected to personal money damages as a consequence of medical necessity decisions made by

AFMC's physicians, particularly considering that federal law both authorizes and encourages states to engage federally certified Utilization and Quality Control Peer Review Organizations such as AFMC. *See* 42 U.S.C. § 1396a(d).

In their attempts to generate fact-specific issues the respondents rely heavily on information that AFMC denied as unnecessary some CHMS services that were routinely provided before there was any systematic medical necessity oversight of CHMS. That, however, is no evidence of wrongdoing. To the contrary, it establishes that the CHMS medical necessity reviews accomplish Congress' goals in enacting peer review and mandating Medicaid utilization controls to prevent unnecessary care. *See* 42 U.S.C. §§ 1320-c and 1396a(a)(30)(A).

The petitioners also rely heavily on a notice published in 1999 in the ARKANSAS DEMOCRAT-GAZETTE newspaper. A.C.A. § 25-15-204 requires such notice as a condition of adopting rules, in this instance, the rule requiring medical necessity reviews in the CHMS program. State law also requires that the notice contain a financial impact statement. A.C.A. § 25-15-204(d)(3)(A). The state, therefore, was obligated to publish an estimate of savings that could result from medical necessity reviews. The respondents cite that statutorily required estimate as evidence of wrongdoing, even though there is no evidence that Hanley or Jeffus made the estimate, or that the estimated savings actually materialized.

To summarize, the petitioners argue that qualified immunity should be denied because medical necessity reviews work as Congress intended, and because public

officials undertook certain tasks that are ministerial under state law.

The respondents' arguments obscure the real issue: Ray Hanley and Roy Jeffus acted in accordance with federal and state laws and as a result are being forced to defend against staggering personal damages claims for decisions they did not make. Put another way, the Eighth Circuit decision forces Medicaid administrators to second guess board-certified physicians correctly (that is, consistently with the trial court) or face personal bankruptcy. No fact-specific inquiry is necessary to overturn such a radical departure from well-settled qualified immunity law followed by this Court and every other Circuit Court of Appeals. And, if the Eighth Circuit's decision is not overturned, it is difficult to overstate the ultimate impact upon publicly funded health care for the poor when top-notch administrators refuse Medicaid jobs and spiraling costs exhaust funds designated for the truly needy.

II. There is a Split Among the Circuits

Ray Hanley and Roy Jeffus did not influence or interfere with any of the medical necessity decisions made by board-certified physicians engaged by AFMC. The respondents sued because those board-certified physicians did not approve all the care that they wanted to furnish.[1]

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[1] The misconduct of AFMC's nurse Coats was not known to the respondents when they sued Hanley and Jeffus over the medical necessity denials. The respondents and the Eighth Circuit exploited the subsequent discovery of Nurse Coat's activities to cast a shadow upon Hanley and Jeffus even though neither had any connection to or contact with Nurse Coats, and had no notice of Nurse Coats' activities before the respondents disclosed those activities in pleadings filed in this case.

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Aside from qualified immunity, the Petition raises only one issue: Is there any well-established and enforceable federal right to favorable medical necessity decisions or to any care that is not medically necessary? As explained elsewhere, there is no such right, and certainly no unambiguously conferred individual federal right. Rather than address this point, the respondents assert enforceable rights under the Early and Periodic Screening, Diagnosis, and Treatment ("EPSDT") as defined in 42 U.S.C. § 1396d(r). But the petitioners do not dispute that Medicaid recipients under age twenty-one are entitled to medically necessary services under EPSDT or that CHMS are EPSDT services. The fact remains, however, that Medicaid may not pay for unnecessary care, regardless of the type of care or age of the beneficiary. 42 U.S.C. § 1396a(a)(30)(A). Because the question is the medical necessity of some CHMS care, not whether CHMS qualifies as an EPSDT service, the respondents' EPSDT arguments are a red-herring designed to mask the fact that there is a clear split among the circuits on the enforceability of 42 U.S.C. § 1396(a)(A)(30)(A).

All the complained-of medical necessity reviews were undertaken to comply with the Medicaid utilization control mandates in 42 U.S.C. § 1396a(a)(30)(A) and 1396d. Section (a)(30)(A) has two subjects: rate-setting and utilization control. The utilization control mandate forbids "unnecessary utilization of . . . care." Rather than address this issue the respondents again attempt to obscure the

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The real issue is not Nurse Coats' conduct before AFMC transferred her from CHMS reviews, but rather the underlying complaint that AFMC's board-certified physicians are not approving the volume of care that CHMS providers would like.

point by arguing that in determining medical necessity the state had to follow rate-setting provisions in Section a(a)(30)(A). Those provisions require states to assure that Medicaid "payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." *Id.*

The provision forbidding payment for unnecessary services is functionally and conceptually distinct from the provision setting standards for payments that are made "for care and services under the plan." The latter refers, as a matter of simple English, to the amount of payment that the state makes for particular covered services, not to payments that are not made at all.

Respondents' attempts to intertwine standards for prohibiting payments (medical necessity) with the standards for making payments (the four rate-setting factors) lead to the inescapable conclusion that the respondents envision some guarantee of minimum service volume or particular provider revenues, concepts that are anathema to the Medicaid program, which provides only that the amount actually paid for each service must comply with the four factors.

As originally enacted in 1967, (a)(30)(A) required states to provide:

> Such methods and procedures relating to the . . . payment for [] care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care, and assure that

> payments (including payments for any drugs provided under the plan) are not in excess of reasonable charges consistent with efficiency, economy, and quality of care . . . .

Section 237, P.L. 90-248, 81 Stat. 821 (1967).

By tying "payments" to "reasonable charges" Congress clearly demonstrated that "payment" meant rates. That is further confirmed by the legislative history. Congress designed the rate setting provisions to assure that Medicaid did not set its prices too low to attract enough providers. H.R. Rep. No. 101-247 at 390, 1989 U.S. Cong. Adm. News 1906, 2116.

Respondents make no claim that Medicaid rates are so low that they can no longer afford to provide CHMS services. In fact, the reverse is true: the respondents want to provide more CHMS care at the existing Medicaid payment rates. Ignoring this irony, the respondents advance the illogical claim that medical necessity must be determined in consideration of the rate-setting factors of efficiency, economy, quality of care, and access. However, Medicaid makes no payment in any amount unless the care is medically necessary. When there is no payment, the payment factors of economy and efficiency are irrelevant. Similarly, if care is not medically necessary and thus not covered for that individual on that day, it is senseless to ask whether the individual has access to the non-covered care. Thus, the provisions cited by the respondents have no application to the medical necessity determinations at issue in this case.[2]

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[2] Other than the District Court and the Eighth Circuit, no court has applied the four rate-setting factors in 42 U.S.C. § 1396a(a)(30)(A)

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Having failed to identify any federally enforceable right applicable to the medical necessity transactions at issue in this case, the respondents simply changed the subject and pointed to rate-setting language. However, the Petition raises no Medicaid rate-setting issues, and the respondents' references to irrelevant issues should not dissuade the Court from granting the Petition.

The respondents do not deny that there is a split among the circuits as to the enforceability of 42 U.S.C. § 1396a(a)(30)(A). Rather than confront the split head-on, they mistakenly assert that they are enforcing 42 U.S.C. § 1396d(a)(13) which, as explained in the Petition, is a definition of Medicaid services. If the respondents were really enforcing the definition of services in § d(a)(13), the dispute would center on whether CHMS services fit that definition. But that is not in dispute: Arkansas Medicaid pays each and every claim for CHMS services for eligible recipients when AFMC's board-certified physicians determine that the services are medically necessary.

III. Conclusion

The petitioners therefore respectfully ask this Court to declare that there is no federally enforceable right in connection with medical necessity transactions under 42

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to anything other than rate setting. *See, e.g., Himes v. Shalala*, 999 F.2d 684 (2d Cir. 1993); *Sobky v. Smoley*, 855 F.Supp. 1123, 1138 (E.D. Cal. 1994); *Fulkerson v. Commissioners*, 802 F.Supp. 529, 536 (D.Me. 1992); and *Philadelphia Welfare Rights Org. v. O'Bannon*, 517 F.Supp. 501, 507 (E.D.Pa. 1981).

U.S.C. § 1396a(a)(30)(A), and that Ray Hanley and Roy Jeffus are entitled to qualified immunity from suit.

Respectfully submitted,

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